IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 471

ANTHONY M. PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

RUDOLPH STAND,
Counsel for Petitioner,
80 Broad Street,
New York 4, N. Y.

ROBERT R. KAUFMAN,
Attorney for Petitioner,
51 Chambers Street,
New York 7, N. Y.

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PETITION FOR REHEARING

Petitioner, on the grounds hereinafter stated, petitions for rehearing of this Court's decision of June 22, 1959, which affirmed the judgment of conviction entered against the petitioner (a physician practicing in New York) for wilful attempted income tax evasion for the years 1950, 1951 and 1952.

Mr. Justice Frankfurter delivered the majority opinion of the Court. In a separate opinion by Mr. Justice Brennan, with whom Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas joined, these four Justices concurred in the result but disagreed strongly with the majority's interpretation of the so-called "Jencks Act", 18 U.S.C. (Supp. V) § 3500 and took issue with the major-

ity's position that the "Jencks Act" was meant to be exclusive.

This petition for rehearing is filed within the time prescribed in Rule 58 (1) of the Rules of this Court and is made pursuant to the provisions of the said Rule.

There has been a change of attorneys for the petitioner herein. By stipulation, Robert R. Kaufman, Esq., was duly substituted in place of the petitioner's former attorneys, Wyllys S. Newcomb and John A. Wells, Esqs. Upon this petition for rehearing and upon the motion for stay of mandate filed contemporaneously therewith, the petitioner is represented by Robert R. Kaufman, Esq., as his attorney, and by Rudolph Stand, Esq. (a member of the bar of the Supreme Court of the United States), as associate counsel for the petitioner.

Grounds for Granting Rehearing

A rehearing of this case is respectfully prayed by the petitioner upon the grounds following:

First: That the so-called "Jencks Act" 18 U.S.C. (Supp. V) § 3500 has received a broad and sweeping construction not in consonance with its language, its legislative history and its constitutional limitations.

Second: That the Court has overlooked material points and decisive authorities duly submitted by counsel upon the argument of the appeal, namely, that the purpose of Congress was only to check "extravagant interpretations" of the *Jencks* decision while reaffirming the fundamental *Jencks* principle of assuring the defendant a fair trial without which due process of law under the Fifth Amendment to the Constitution cannot exist.

Third: That the Court has overlooked the inevitable and logical consequences which must flow from the deci-

sion already rendered in the case at bar. The law as now laid down by this Court holding that the "Jencks Act" and not the *Jencks* decision (*Jencks* v. *United States*, 353 U. S. 657) governs exclusively the production of statements of government witnesses for a defendant's inspection at trial raises grave constitutional problems under the Fifth and Sixth Amendments to the Constitution.

It is proper to say that in presenting this petition for a rehearing we have clearly in mind that petitions for rehearing, especially after decision on the merits, are not favored and are seldom granted. In view, however, of our belief that the Court has overlooked controlling decisions of this Court and in view of the far-reaching importance of the questions herein involved in the administration of federal criminal justice, we feel that we are well justified in further occupying the time of the Court with a consideration of this case. We do not file this petition simply to satisfy a desire to argue once more the very questions which have already been submitted and which have been decided by the Court.

The Court, in declaring in its majority opinion (p. 8) that:

> "The purpose of the Act, [§ 3500 of the Criminal Code, 18 U.S.C.] its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. § 3500 cannot be produced at all."—

has, we very respectfully submit, overlooked the views of the minority opinion (p. 2) which contains this passage:

> "Congress had no thought to invade the traditional discretion of trial judges in evidentiary matters beyond checking extravagant interpretations of our decision in *Jencks* v. *United States*, 353 U. S. 657, which were said to have been made by some lower courts.

> Indeed Congress took particular pains to make it clear that the legislation 'reaffirms' that decision's holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a government witness has testified at the trial * * *. Certainly nothing in the statute or its legislative history justifies our stripping the trial judge of all discretion to make nonqualifying reports available in proper cases. * * *"

The facts are sufficiently set forth in the statement of the case (Petitioner's Brief, pp. 5-14). It is abundantly clear therefrom that Arthur R. Sanfilippo, an important government witness and the principal partner in the accounting firm which had prepared and filed the petitioner's income tax returns for upwards of twenty-five years was the government's main witness. The basic framework of the evidence against the petitioner rested completely upon his testimony. Sanfilippo had been questioned on a prior occasion by the government agent on exactly the same subject matters covered by his testimony given at the trial. Within a few hours after this conference with this witness, the agent had made a detailed memorandum in which, without direct quotation, he set forth the substance of what the witness said to him on the subject matters in question. During the cross examination of Sanfilippo, petitioner's counsel moved for an order directing the government to permit him to inspect those portions of the memorandum in which the agent had recorded the substance of what the witness had said as to the same subject matters.

The petitioner contended that the inspection sought by him upon the trial was expressly within the scope and meaning of 18 U.S.C. § 3500; that the said statute was not intended to and does not prohibit inspection of the

substance of an oral statement made by a government witness to a government agent relating to the same subject matters as were testified to by the witness upon the trial even though the statement be held not to have satisfied in all respects the requirements of the new statute.

The petitioner further urged that the inspection sought below should clearly have been granted on the authority of *Jencks* v. *United States, supra*, and if the statute was construed and applied as to prohibit inspection under the circumstances presented by the record, such statute deprived the petitioner of due process of law and is violative of the Fifth Amendment.

It must be borne in mind that the "Jencks" Act was so called because it was enacted to prevent possible damage to national security following this Court's decision in *Jencks* v. *United States, supra* (a non tax case) holding that the defense was entitled to obtain for impeachment purposes on cross examination, statements which had been made by two paid undercover agents for the F.B.I., who stated that they had made reports to the F.B.I. on the matters about which they had testified. Jencks, a labor union leader, was charged with filing a false affidavit that he was not a member of the Communist Party or affiliated with such Party. The Government's principal witnesses were Communist Party members paid by the Federal Bureau of Investigation to make reports of Communist Party activities in which they participated.

The doctrine and rationale of the *Jencks* case that a defendant on trial should be entitled to statements helpful in the cross examination of government's witnesses who testify against him did not announce any new principle of law. The *Jencks* rule was designed solely to facilitate proper cross examination. It is an elementary proposition that cross examination is a weapon, with which a defendant defends himself against the prosecution, and he is entitled to use it upon the witnesses, to test their credibility.

Nevertheless, the *Jencks* decision precipitated a storm of controversy because of the claim that it would force the F.B.I. and other governmental agencies to open their secret files at the demand of any defendant in a criminal case and was, therefore, a threat to the country's security. On the other hand, critics of the "*Jencks Act*" maintained that it places too many unjust restrictions on their right to try to discredit their accusers.

In the case at bar no claim was made that the statement demanded by defense counsel was privileged against disclosure on grounds of national security, state secrets, confidential character of the report, public interest or otherwise.

Cross examination is a matter of right. It is the essence of a fair trial. Counsel cannot know in advance what pertinent facts may be elicited on cross examination. For this reason it is necessarily exploratory. Denial of reasonable latitude in this respect is reversible error (*Alford* v. *United States*, 282 U. S. 687, 691-694).

The common law judges and lawyers for two centuries past have regarded the opportunity of cross examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that cross examination is a distinctive and vital feature of our law (5 *Wigmore on Evidence*, § 1367 (3rd Ed.)).

The first, and probably the most effective and most frequently employed line of attack upon the credibility of a witness, is by proving that the witness on a previous occasion has made statements inconsistent with his present testimony. "It seems wise to stand firm upon ordinary considerations of fairness, and to hold that the prosecutor is not entitled at the trial to withhold from the inspection of the accused and the jury any documents • • • relevant to the case" (8 *Wigmore on Evidence*, § 2224 (3rd Ed.)).

The principle stated by Judge Cooley in *People* v. *Davis*, 52 Mich. 569, 573, quoted with approval in *Gordon* v. *United States*, 344 U. S. 414, 419, is equally appropriate here:

> "The state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. * * * If there shall be in the possession of any of its [the State's] officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it."

A trial ought not to be regarded as a mere contest or game of skill between opposing counsel. "The right to fair trial is the right that stands guardian over all other rights." (*Dennis* v. *United States*, 339 U. S. 162, 173.) A fair trial is in all of the decisions of this Court declared to be one of the conditions without which due process of law cannot exist (*Ong Chang Wing* v. *United States*, 218 U. S. 272, 279, 280; *Hill* v. *Texas*, 316 U. S. 400, 406).

In *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, Mr. Justice Frankfurter, in a concurring opinion, said, at pages 162-163:

> "The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But 'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound

> attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."

As Mr. Justice Brennan suggested in the minority opinion, the majority's interpretation of the statute may encourage "a practice of government agents taking statements in a fashion calculated to insulate them from production" (p. 6). Such practice would not be conducive to a fair trial which is the basic principle of the *Jencks* case.

In the *Jencks* case, the Court declared (pp. 667-8) that the interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Justice cannot be done, if, as stated in the minority opinion at page 6:

> "There inheres in an overrigid interpretation and application of the statute the hazard of encouraging a practice of government agents' taking statements in a fashion calculated to insulate them from production."

In an address at the Columbia Law Review dinner, Mr. Justice Douglas, in April 1959, said:

> "Procedural due process gives protection to the citizen against overreaching officials. Abuse of power by government is an ancient evil. Those who drafted the Constitution and Bill of Rights had personal ex-

perience with attorneys general, public prosecutors, and even judges who were willing to take shortcuts to carry out the will of a king. Our forefathers knew that a majority in a democratic society could be as tyrannical as any king. So these procedural safeguards were interposed to prevent overreaching by officials, to immunize trials from public hysteria, to make the public trial in America a calm objective affair, not a spectacle."

These words are equally applicable here, in the light of the tenor of the minority opinion and the compelling logic of this statement at pages 2-3:

"Even the Government, in oral argument, conceded that the statute did not strip the district judges of discretion to order production of such a statement under some circumstances. There is an obvious constitutional problem in an interpretation that the statute restrains the trial judge from ordering such a statement produced. Less substantial restrictions than this of the common-law rights of confrontation of one's accusers have been struck down by this Court under the Sixth Amendment. See *Kirby* v. *United States*, 174 U. S. 47. And in such circumstances, there becomes pertinent the command of that Amendment that criminal defendants have compulsory process to obtain witnesses for their defense. See *United States* v. *Schneiderman*, 106 F. Supp. 731, 738. It is true that our holding in *Jencks* was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; indeed, the Congress recognized its constitutional overtones in the debates on the statute."

CONCLUSION

For the reasons assigned herein, the petitioner respectfully prays that his petition for rehearing be granted.

Respectfully submitted,

RUDOLPH STAND,
Counsel for Petitioner.

ROBERT R. KAUFMAN,
Attorney for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

RUDOLPH STAND,
Counsel for Petitioner.